81-6586

NUMBER

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

NO: 81-1609

AUGUSTINE MAZZIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
COURT OF APPEALS NO. 81-1609

PETITION FOR CERTIORARI

AUGUSTINE MAZZIO
Pro Se
229 Munn Lane
Cherry Hill, N.J. 08034

I. QUESTIONS PRESENTED

Whether the lower court erred by telling the jury in supplemental instructions that the question presented by the defense of entrapment is whether an innocent person who had no thought or intention whatsoever of committing a crime was induced to do so by a government agent and by reducing the issue on entrapment to an assessment of the relative credibility of each side's position?

II. LIST OF PARTIES

Petitioner, Augustine Mazzio and the United States of America are the only parties to this action.

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V. JURISDICTIONAL STATEMENT

This criminal conviction was affirmed by the Circuit Court of Appeals for the Third Circuit on February 25, 1982, making this petition timely when mailed within sixty days of that date pursuant to Supreme Court Rule 20.1.

VI. STATEMENT OF THE CASE

A. Procedural History

A true bill was issued September 8, 1980. On July 12, 1980, there was an entry of a plea of not guilty. On January 22, 1981, the jury returned a verdict of guilty on Counts 1,2, 3,4,5,6, and 8, Count 7 being dropped by the government. On March 9, 1981, Petitioner was sentenced to three (3) years imprisonment and a fine of Two Thousand Dollars ($2,000.00) on Count 1, with concurrent sentencing on Counts 2 through 6, with five (5) years probation to run consecutively on Counts 1 through 6. Petitioner appealed the verdict from the Third Circuit Court of Appeals, and that Court conferred the conviction. See Judgment Order attached hereto and marked Exhibit "A".

B. Factual History

Defendant, Augustine Mazzio, was charged in eight counts of Bill of Indictment Number 80-291 with racketeering influenced and corrupt organizations conspiracy and substantive violations (Count 1 and 2); interstate transportation in aid of racketeering (Counts 3,4,5, and 6); obstruction of local law enforcement (Count 7); and operating an illegal gambling business (Count 8), in violation of 18 U.S.C. §§1962(c) and (d), 1952, 1511, and 1955 respectively. He was found guilty by a jury on Counts 1,2,3,4,5, 6 and 8, Count 7 having been dismissed by the government at the conclusion of its case-in-chief.

The facts viewed in a light most favorable to the government and which Augustine Mazzio did not dispute at trial are as follows. The major witness called by the government was a Philadelphia Police Officer, Jack Woodman, who posed as a corrupt cop for approximately three years during which time he received payments from alleged number writers including Augustine Mazzio in exchange for allegedly protecting their operations from arrests and searches.

Woodman testified that in September of 1977, he was told by co-defendant Samuel Sliwoo, a fellow police officer, that Augustine Mazzio wanted to see him. Woodman interpreted this conversation as a bribe offer and immediately reported it to his superiors. At that time, Woodman was conducting an investigation into Mazzio's numbers operation in South Philadelphia. The meeting between Mazzio and Woodman did not take place; instead, Sliwoo told Woodman that money for Woodman would be paid through him. Subsequently, Sliwoo delivered $35.00 to Woodman in November and December 1977.

Although Sliwoo had told Woodman that Augustine Mazzio was reluctant to meet with him, a meeting between the two eventually took place on December 9, 1977. During this meeting, Mazzio told Woodman, who secretly recorded the conversation (G16), that he wanted nothing from Woodman except to be left alone, apparently referring to his numbers operation. The two men, however, did agree to a monthly meeting.

On January 3, 1978, Augustine's nephew, Leon, a co-defendant, met with Woodman and gave him $75.00. A similar payment was made by Leon on February 1, 1978.

On February 13, 1978, Woodman arranged to meet with Augustine Mazzio, at which time he read him reports of surveillances of his numbers operation. Unbeknownst to Mazzio, these reports had been fabricated to foster the impression that Woodman as a corrupt cop had access to inside information about the activities of the F.B.I. and the Philadelphia Police. After hearing the alleged reports, Mazzio gave Woodman $100.00. (N.T.2-64)

Woodman again met with Augustine Mazzio on March 7, 1978. At this meeting, Woodman purported to give Mazzio information about F.B.I. surveillances of one of his number writers. In exchange, Mazzio paid Woodman $100.00 (N.T. 2-106-08). One week later, Woodman again met with Augustine Mazzio and purported to provide him with information regarding surveillances of Leon Mazzio. On this date, Augustine Mazzio paid him $100.00 (N.T. 2-110).

Woodman next met with Augustine Mazzio on May 3, 1978, and received $50.00. (N.T. 2-117) As a result of this meeting, Woodman and the F.B.I. fabricated intelligence reports concerning friends of Augustine Mazzio, which reports were delivered to Mazzio on June 12, 1978. (N.T. 2-117-18) The two met again on the following day at which time Mazzio paid $50.00 to Woodman for the information (N.T. 3-6).

Woodman next saw Augustine Mazzio on July 27, 1978, at which time he had with him a hit sheet and a surveillance report on an individual named John Leonard who was allegedly part of Mazzio's operation. (N.T. 3-12) Mazzio paid him $350.00 for this information and his continued protection. (N.T. 3-16-17)

Woodman received monthly payments from Leon Mazzio in the remaining months of 1978. He next met with Augustine Mazzio on February 28, 1979. (N.T. 3-40) During this meeting the two discussed co-defendant Theodore Paige, another number writer.

In September of 1979, Augustine Mazzio paid $200.00 to Woodman for four months protection. (N.T. 3-53) Starting in October of 1979, the monthly payment was increased to $100.00 per month to include protection for Theodore Paige's operation. (N.T. 3-54) Accordingly, in November of 1979, Mazzio paid Woodman $100.00 (N.T. 3-58).

Woodman met with Augustine Mazzio and Theodore Paige in January of 1980. (N.T. 3-59) At this meeting, each defendant paid money to Woodman. (N.T. 3-61) Augustine Mazzio paid Woodman $250.00 on March 24, 1980. (N.T. 3-65)

On April 21, 1980, Woodman showed Augustine Mazzio bogus F.B.I. reports pertaining to an associate named Iezzi. (N.T. 4-9). Mazzio paid him $250.00, $200.00 of which was from Theodore Paige, and took the report with him. (N.T. 4-10) Later that day, Mazzio

returned the documents to Woodman and gave him an additional $25.00 (N.T. 4-14)

On May 13, 1980, Augustine Mazzio paid Woodman $250.00, including $200.00 from Paige. (N.T.4-15-16). Finally, on June 10, 1980, Mazzio paid Woodman $50.00 (N.T. 4-16)

Woodman admitted on cross-examination, that his first meeting with Augustine Mazzio came about only after approximately 18 attempts on Woodman's part to set up the meeting. (N.T. 4-242) Moreover, Woodman had heard repeatedly that Mazzio did not want to meet with him. (N.T. 4-242)

As mentioned previously, Augustine Mazzio did not dispute that he met with Woodman and paid him money. Indeed, counsel for Augustine Mazzio conceded in his opening statement that the payments were made but contended nonetheless that the government had created the scheme and nurtured it during the course of the investigation. (N.T. 1-20) Moreover, early in the trial, counsel for Augustine Mazzio again acknowledged that he was relying on an entrapment defense, thus affording the government an opportunity to present evidence on Mazzio's predisposition to commit the offenses. (N.T. 2-7-8).

At the close of the testimony, the Court agreed to charge the jury on entrapment as requested by Mazzio. (N.T. 7-8) Counsel for Augustine Mazzio then devoted the major portion of his argument to his entrapment defense, highlighting the number of attempts by

Woodman to set up the first meeting and subsequent meetings with Mazzio. (N.T. 7-58-59) and the threat of arrest that Woodman held over Mazzio's head. (N.T. 7-62)

The Court subsequently charged the jury on entrapment. After deliberating for approximately two hours, the jury sent a note to the Court asking, inter alia, for the Court to explain again the defense of entrapment. (N.T. 8-70) The Court thereupon gave them a supplemental instruction.

The following morning, the jury found Augustine Mazzio guilty on all counts that were left for their determination.

On March 6, 1981, the Honorable Alfred L. Luongo imposed the following sentence: three (3) years imprisonment and a Two Thousand Dollar ($2,000.00) fine on Count 1; a concurrent sentence of three (3) years imprisonment on Counts 2 through 6; and five (5) years probation on Count 8.

VII. ARGUMENT

THE TRIAL JUDGE ERRED IN HIS SUPPLEMENTAL INSTRUCTIONS TO THE JURY BY STATING THAT THE DEFENSE OF ENTRAPMENT WAS APPOSITE ONLY IF DEFENDANT WAS WHOLLY INNOCENT AND BY REDUCING THE INQUIRY TO AN ASSESSMENT OF THE RELATIVE CREDIBILITY OF THE GOVERNMENT'S AND THE DEFENSE'S POSITIONS.

The RICO counts of the indictment charged that Augustine Mazzio was a part of an enterprise associated in fact for the purpose of corruptly influencing and infiltrating the Philadelphia Police Department and the F.B.I. by offering, conferring and delivering bribery payments to police officers of the City of Philadelphia. The indictment also charged that one of the roles played by Augustine Mazzio in the enterprise was to obtain F.B.I. investigative information.

Mazzio's defense was that although he was a gambler, he was not a bribor. Moreover, he claimed through his counsel that the portion of the government's case that focused on Mazzio's meetings with Woodman to obtain F.B.I. reports was merely another manifestation of Woodman's desire to ensnare Mazzio, (N.T. 7-70)

In its charge to the jury, the Court instructed the jury on entrapment in language that is similar to that contained in the standard Devitt and Blackmar charge.[1] Devitt & Balckmar, Federal

[1] This charge has been recommended by this Court as the type of instruction that should be given on entrapment. Government of Virgin Islands v. Cruz, 478 F. 2d 712 (3d Cir. 1973). It should be noted, however, that the charge was amended shortly before the trial in the instant case to include the admonition that the government bears the burden of proving beyond a reasonable doubt that the defendant was not entrapped. Devitt & Balckmar, Federal Jury Practice and Instructions, §13.09 (1981 Supp.)

Jury Practice and Instructions, §13.09 (2d. ed. 1970) During deliberations, the jury asked for a renewed explanation of entrapment. The Court then gave a similar charge on entrapment but prefaced its remarks by stating:

> And, perhaps the words that I used were a little too technical. I am going to repeat them, and then perhaps I can simplify it a bit for you.
>
> The question that is presented on entrapment is whether an innocent person who had no thought of committing a crime was induced to do so by the powers of persuasion of a Government agent, and whether the powers of persuasion were such that it overbore the will of this person who had no intent whatsoever to commit a crime.
>
> (Emphasis added)

After then repeating the general charge on entrapment, the Court stated: "Now, you must review again, members of the jury, the evidence in the case. And depending upon which version of the evidence you accept, you may or may not have much of a problem with respect to entrapment."

Subsequently, the Court attempted to reiterate each side's version of the defense, and, upon objection from counsel for Augustine Mazzio, reminded the jury that the Court was not attempting to give a complete summary of the respective positions.

The sole issue[2] presented herein is whether the supplemental charge on entrapment mis-stated the law of entrapment as it relates

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[2]Counsel for Augustine Mazzio contended vigorously pre-trial and at tril that the RICO charges were inapposite where, as here, the enterprise existed solely for illegal purposes. This argument is now foreclosed, however, by the Supreme Court's decision in the United States v. Turkette, No. 80-808 (Sup. Ct., filed June 17, 1981), U.S. , 29 Cr. L. Rptr. 3088.

to the status that the defendant must occupy at the outset of the investigation and whether the supplemental charge diluted the government's burden of proof to the extent that it devolved the issue to a credibility battle between Woodman and the defense contentions.

As to the first part of the argument, Mazzio maintains that the Court erred in including phrases such as "innocent person who had no thought of committing a crime" and person "who had no intent whatsoever to commit a crime" in the supplemental charge. Mazzio never contended that he was an "innocent person" with no intent "whatsoever" to commit a crime. To the contrary, his attorney freely admitted throughout the trial[3] that Mazzio was a number writer. And, Mazzio never attempted to assert entrapment as a defense to the gambling charge contained in Count Eight. What he did maintain was that although he might have been part of a gambling operation, he would not have been party to a scheme to bribe police and obtain F.B.I. documents (nor travel interstate to do so) were it not for the insistence and persistence of Officer Woodman.

Mazzio does not claim that this record establishes entrapment as a matter of law. See United States v. Bocra, 623 F. 2d 281 (3d. Cir. 1980). Instead, he now posits that the defense was structured on theory of entrapment and went to the jury primarily,

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[3]There should be no question that Mazzio's attorney by his concessions during trial met the threshold requirements for asserting his entrapment defense. See United States v. Levin, 606 F 2d. 47 (3d. Cir. 1979).

if not solely, on that issue. Therefore, the Court should not have altered the groundrules by imposing an additional element to the defense in its supplemental charge.

Unfortunately, attempts to make a jury charge more understandable sometimes leads to reversible error. This Court's decision in United States v. Silver, 457 F. 2d. 1217 (3d. Cir. 1972) is an illustration of this point. There, the trial judge confronted with an entrapment defense gave a jury charge that was almost verbatim with that set forth in Devitt & Blackmar. He then decided to simplify the charge by focusing upon the good faith vel non of the government agents. In reversing the conviction, this Court observed: "The 'simplifying' instructions in the main charge, their repetition in the supplementary charge, and in the answer to the jury's question, made a shambles of the correct instructions as to the defense of entrapment." Id. at 1221. Elsewhere, this Court noted: "What has been said established that the trial judge committed reversible error because he so intertwined correct instructions with incorrect instructions as to negative the effect of the correct instructions and the net effect was to give proscribed equivocal direction to the jury on a basic issue." Id. at 1222.

The error in the instant case may not be as egregious as in Silver but it is submitted that it is error nonetheless. If the Court's charge were a correct statement of law, it would mean that only an individual who was as clean as the fresh driven snow could claim entrapment regardless of the efforts made by the government to alter radically the nature and dimensions of a person's

criminal activity. Simply put, the instant investigation as one involving simply a gambling operation would probably never have found its way into federal court and the defense was that Woodman knew this and therefore made Augustine Mazzio into something that he was not.

Another instance of an improper simplification of the issue was the Court's charge that entrapment may or may not be a problem depending upon which version of the evidence the jury accepted. The phenomenon of boiling the issue down to an assessment of relative credibility was recently denounced by this Court with the directive that district courts "not use language in instructions which can be understood as diluting or in any way impairing the constitutional requirement of proof beyond a reasonable doubt." United States v. Pine, 609, F. 2d. 106, 108 (3d Cir. 1979)

It is submitted that the above-discussed supplemental instructions worked to deprive defendant of a fair trial in that the jury was improperly apprised of the law to be applied in its deliberations.

VIII. CONCLUSION

For the reasons stated herein, it is respectfully submitted that this Court should approve this case for review.

I Augustine Mazzio am filing the enclosed documents pursuant to the United States Supreme Court Rules 46 and 39.

Augustine Mazzio

AUGUSTINE MAZZIO
Pro se

NUMBER

IN THE SUPREME COURT OF THE UNITED STATES

AUGUSTINE MAZZIO, Petitioner	:	
vs.	:	NO. 81-1609
UNITED STATES OF AMERICA	:	

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, moves pursuant to Supreme Court Rule 46.1 and respectfully represents:

1. Petitioner was represented by private counsel, Gilbert Scutti, Esquire throughout the Appeal to the Third Circuit Court.

2. Petitioner was without funds to hire counsel for the enclosed Writ of Certiorari.

3. Petitioner has no savings or bank account and his home is presently up for Sheriff Sale.

4. Petitioner has not requested appointment of counsel and is therefore filing pro se.

WHEREFORE, petitioner respectfully requests that he be permitted to file the accompanying Petition for Certiorari in forma pauperis.

Respectfully submitted,

Augustine Mazzio

AUGUSTINE MAZZIO
Pro se

"EXHIBIT A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 81-1609 & 81-1611

UNITED STATES OF AMERICA

v.

AUGUSTINE MAZZIO, a/k/a Gus,
Appellant in No. 81-1609

SAMUEL SLIWOO,
Appellant in No. 81-1611

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Crim. No. 80-00291-01 & 04

Submitted Under Third Circuit Rule 12(6)
February 19, 1982

Before: ADAMS and SLOVITER, Circuit Judges, and
STERN, District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, namely, that (1) the trial judge erred in his supplemental instructions to the jury by stating that the defense of entrapment was apposite only if defendant was wholly innocent and by reducing the inquiry to an assessment of the relative credibility of the government's and the defense's positions; (2) the trial judge committed prejudicial error by his failure to grant a separate trial for the defendant Samuel Sliwoo; (3) the prosecutor's cross-examination of the defendant Sliwoo's character witnesses improperly invaded the province of the jury and denied Sliwoo an opportunity to present his defense; (4) the prejudicial and inflammatory comments of the prosecutor in his closing statements constitute reversible error; and (5) the

government indictment and trial of the defendant Sliwoo pursuant to the RICO Statute, 18 U.S.C. §§ 1961, et seq. was unconstitutional as applied and an attempt to circumvent the general law of conspiracy and Fed. R. Crim. Pro. 8 and 14, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT.

Circuit Judge

ATTEST:

Sally Mrvos, Clerk

DATED: February 25, 1982

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* Hon. Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.